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In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

GERMAN MUNOZ-FLORES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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65 pp

QUESTION PRESENTED

Whether 18 U.S.C. 3013, which directs sentencing courts to impose monetary assessments on all defendants convicted of federal offenses, was enacted in violation of the Origination Clause of the Constitution, Art. I, § 7, Cl. 1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 863 F.2d 654. The opinion of the district court (App., *infra*, 16a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1988. A petition for rehearing was denied on March 29, 1989. App., *infra*, 29a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS !NVOLVED

The Origination Clause of the United States Constitution, Art, I, § 7, Cl. 1, states:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Section 3013 of Title 18, U.S. Code (Supp. IV 1986), as it was enacted by the Victims of Crime Act of 1984, Pub. L. No. 98-473, Tit. II, ch. XIV, § 1405(a), 98 Stat. 2174-2175, provided:

> **§ 3013. Special assessment on convicted persons**
>
> (a) The court shall assess on any person convicted of an offense against the United States –
>
> (1) in the case of a misdemeanor –
>
> (A) the amount of $25 if the defendant is an individual; and
>
> (B) the amount of $100 if the defendant is a person other than an individual; and
>
> (2) in the case of a felony –
>
> (A) the amount of $50 if the defendant is an individual; and
>
> (B) the amount of $200 if the defendant is a person than an individual.
>
> (b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

STATEMENT

1. In June 1985, respondent and several other persons were indicted in the Southern District of California for aiding the illegal entry of aliens. Prior to trial, respondent entered into a plea agreement with the government. Pursuant to the agreement respondent pleaded guilty to a

superseding information charging him with two misdemeanor counts of aiding and abetting aliens to elude examination and inspection by government officials, in violation of 8 U.S.C. 1325. App., *infra*, 16a, 31a-32a.

In accord with the government's recommendation, the magistrate to whom the case was assigned suspended the imposition of any prison sentence and placed respondent on two years' probation on each count. The magistrate also directed respondent to pay a $25 special assessment on each count under 18 U.S.C. 3013(a) (Supp. IV 1986). That provision, which was enacted by the Victims of Crime Act of 1984, Pub. L. No. 98-473, Tit. II, § 1405(a), 98 Stat. 2174-2175, stated: "The court shall assess on any person convicted of an offense against the United States – (1) in the case of a misdemeanor – (A) the amount of $25 if the defendant is an individual * * *."[1] The judgment embodying the conviction and sentence, including the suspension of prison sentence, probation, and the total of $50 in assessments, was entered on September 30, 1985. App., *infra*, 16a-17a, 27a-28a.

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[1] Section 3013(a) was amended in 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7082, 7085, 102 Stat. 4407, 4408; see App., *infra*, 33a-34a (reproducing current version of Section 3013 and identifying amendments). The amendment, which refined the schedule of assessments for misdemeanors and infractions, does not apply in the present case, as the offenses, the prosecution, and the judgment all occurred in 1985. Under the current version of Section 3013, respondent's offenses, which would be Class B misdemeanors (18 U.S.C. 3559 (Supp. IV 1986)), would result in assessments of only $10 per count. Subsec. (a)(1)(A)(ii). The 1988 amendment, like the 1987 amendment that added subsections (c) and (d) to Section 3013 (see Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, § 3, 101 Stat. 1279), did not alter Section 3013's directive that assessments shall be imposed on all persons convicted of a federal offense.

On October 15, 1985, respondent filed a motion under Rule 35, Fed. R. Crim. P. (1985),[2] asking the magistrate to correct the allegedly illegal sentence. Respondent's principal argument was that Section 3013 as enacted was unconstitutional under the Origination Clause of the United States Constitution, Art. I, § 7, Cl. 1, because, he contended, it was a "revenue raising statute that unconstitutionally originated in the United States Senate." App., *infra*, 17a. The magistrate rejected the argument and denied the Rule 35 motion. C.A. Excerpt of Record 36-39 (transcript of oral ruling).

On appeal pursuant to 18 U.S.C. 3402, the United States District Court for the Southern District of California affirmed. App., *infra*, 16a-25a.[3] The court observed that it is "well established that the origination clause does not invalidate statutes that are primarily regulatory or penal, but which raise revenue incidentally." *Id.* at 18a. The court concluded that Section 3013 as enacted in 1984 was primarily penal, relying on congressional descriptions of the assessments as penal and on the analysis in *United States* v. *Mayberry*, 774 F.2d 1018 (1985), in which the Tenth Circuit held that Section 3013 was penal for purposes of the Assimilative Crimes Act, 18 U.S.C. 13. App., *infra*, 18a-22a.[4]

[2] At the time, Rule 35(a) provided that "[t]he court may correct an illegal sentence at any time." Rule 35 was completely revised effective November 1, 1987, by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, § 215(b), 98 Stat. 2015. See § 235(a)(1), 98 Stat. 2031; Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728.

[3] The district court, like the magistrate, rejected not only the Origination Clause challenge but also respondent's additional arguments—that only one assessment could be imposed on him because his two offenses arose from a single transaction (App., *infra*, 23a-24a), and that no special assessment could be imposed for a petty offense, such as his violation of 8 U.S.C. 1325 (App., *infra*, 24a-25a).

2. The court of appeals held Section 3013 as enacted invalid under the Origination Clause and therefore vacated the sentence insofar as it imposed the two $25 assessments. App., *infra*, 1a-15a. The court explained that the Origination Clause establishes a straightforward three-part test for validity: whether "the statute falls within the class of revenue raising bills covered by the clause"; if so, whether "the bill [*i.e.*, the statute] originated in the House"; and if not, whether the Senate's participation in the legislative process can be construed as an amendment permissible under the clause." App., *infra*, 6a & n.4. The court concluded that Section 3013 as enacted failed that test.[5]

[4] The Tenth Circuit held that, because Section 3013 assessments were penal, they were inapplicable to cases arising under the Assimilative Crimes Act, which states that persons who violate state criminal laws in certain areas within federal jurisdiction "shall be guilty of a like offense and subject to a like punishment" (18 U.S.C. 13). In 1987, Congress overruled *Mayberry* by adding subsection (d) to Section 3013. See App., *infra*, 34a.

[5] The court ruled that respondent's Origination Clause challenge does not present a nonjusticiable political question. App., *infra*, 2a-4a. While noting that Congress itself has means to police its own compliance with the Origination Clause (*id.* at 3a & n.1), the court stated that the text of the Clause does not commit its enforcement to the political branches and that the standards of the Clause are judicially manageable and involve no policy determinations (*id.* at 3a-4a). The court also observed that five decisions of this Court and numerous lower court decisions had adjudicated Origination Clause challenges on the merits, although, among all of those decisions, only one district court decision, rendered in 1915, had actually found a violation of the Clause. *Id.* at 4a, 5a-6a & n.3 (citing *Hubbard* v. *Lowe*, 226 F. 135 (S.D.N.Y. 1915)). That lone decision held a statute invalid under the Clause where (a) the parties agreed that the enacted bill was one for

a. On the first question, the court stated that this Court's decisions in *Millard* v. *Roberts*, 202 U.S. 429, 436 (1906), *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 202 (1897), and *United States* v. *Norton*, 91 U.S. (1 Otto) 566, 569 (1875), established that the Origination Clause "do[es] not extend to bills that incidentally create revenue if those bills were enacted for purposes other than revenue raising." App., *infra*, 6a. Section 3013, the court concluded, was enacted for the purpose of raising revenue.

As an initial matter, the court noted that the statutory language did not sufficiently establish another purpose. The court explained that Section 3013(b), which states that assessments "shall be collected in the manner that fines are collected in criminal cases," might suggest that the assessment is analogous to a fine and therefore punitive, but the court declined to draw that inference. It reasoned that subsection (b) "may be interpreted as a purely procedural requirement" and that the absence in Section 3013 of a restriction on the use of the collected funds "suggests that the revenue raising aspect of the bill is not subsidiary to any enunciated functions." App., *infra*, 7a-8a.

Turning to the legislative history of Section 3013, the court pointed out (App., *infra*, 8a) that the provision was designed in part to help defray the cost of the newly established Crime Victims Fund, which would provide funds to assist victims of crime (42 U.S.C. 10601 *et seq.*). See S. Rep. No. 497, 98th Cong., 2d Sess. 13-14 (1984). The court acknowledged, based on *Millard* v. *Roberts*, 202 U.S. at 436-437 (rejecting Origination Clause challenge to tax on District of Columbia property enacted to provide funding to railway company), that the provision might

raising revenue and (b) the bill was accompanied by an official certification by the secretary of the Senate that the bill originated in the Senate. 226 F. at 137, 138.

well have been constitutional "[h]ad the proceeds been clearly confined to this purpose." App., *infra*, 8a. The court concluded, however, that Section 3013's main purpose was not to fund victims' assistance programs, because "Congress contemplated that the revenue might be used as general federal revenue." App., *infra*, 9a. The court relied for that conclusion (*id.* at 8a, 9a) chiefly on the Senate Judiciary Committee's statement—in the Senate Report that accompanied a bill, S. 2423, 98th Cong., 2d Sess. (1984), that was similar but not identical to the ultimately enacted Section 3013—that the assessments "will constitute new income for the Federal government." S. Rep. No. 497, *supra*, at 14.[6]

The court next rejected (App., *infra*, 10a) the suggestion that the penal character of the assessments was shown by the fact that the Senate Committee and S. 2423 both used the term "penalty assessment." See S. Rep. No. 497, *supra*, at 5, 13; 130 Cong. Rec. 23,803-23,804 (1984) (reproducing S. 2423 as passed by the Senate). The label "penalty" is irrelevant, the court said, and "penalty assessment" does not appear in the codified version of the statute, since Congress changed the language to "special assessment" in the enacted bill. That Section 3013 exacts money only from convicted persons, the court continued, does not mean that the exaction is not a tax, for Congress is free to tax the class of convicted persons. App., *infra*, 10a-11a. In addition, the court explained that there was no persuasive judicial precedent holding Section 3013 punitive

[6] The court also stated (App., *infra*, 9a) that "Congress failed to restrict the use of the monies assessed under section 3013 in any way, so that they might be shifted to another purpose at any time" and that Congress recognized that "only small amounts would be collected by the assessments."

for purposes of the Origination Clause.[7] Accordingly, the court concluded (App., *infra*, 12a) that "the primary purpose of the special assessment was to raise revenue, not to finance state victim assistance programs or to punish offenders."

b. The court next concluded that the legislative history "clearly indicates that section 3013 originated in the Senate." App., *infra*, 12a. Although Section 3013 was enacted into law by Section 1405(a) of a House bill, H.R.J. Res. 648, 98th Cong., 2d Sess. (1984), the court examined the legislative history to determine from which house the particular assessment provision came. The court found that Section 3013 originated in a Senate bill, S. 2423, 98th Cong., 2d Sess. (1984).

The court explained that, on May 1, 1984, in hearings on S. 2423, Senator Heinz proposed to include in that bill a provision allowing for the collection of "penalty assess-

[7] The court noted (App., *infra*, 11a-12a) that all but one of the prior decisions holding that Section 3013 assessments are punitive drew that conclusion for purposes of the Assimilative Crimes Act, 18 U.S.C. 13, or the Seventh Amendment civil jury trial right. See *United States* v. *Mayberry*, 774 F.2d 1018 (10th Cir. 1985) (18 U.S.C. 13); see also *United States* v. *Davis*, 845 F.2d 94, 97 n.2 (5th Cir. 1988) (same); *United States* v. *King*, 824 F.2d 313, 317 (4th Cir. 1987) (same); *United States* v. *Smith*, 818 F.2d 687 (9th Cir. 1987) (Seventh Amendment). The court declined to follow the sole prior decision rejecting an Origination Clause challenge to Section 3013, *United States* v. *Ramos*, 624 F. Supp. 970, 973 (S.D.N.Y. 1985), explaining that it relied on *Mayberry*'s analysis outside the Origination Clause context. App., *infra*, 12a. The court of appeals also noted (*id.* at 11a) that two decisions, *United States* v. *Donaldson*, 797 F.2d 125, 127 (3d Cir. 1986), and *United States* v. *Dobbins*, 807 F.2d 130 (8th Cir. 1986), had stated that Section 3013 was not a criminal statute subject to the rule of lenity because its purpose was to raise funds to support the crime victims' assistance program; the court of appeals did not discuss those decisions in rejecting the claim that the purpose of Section 3013 was to support the victims' program.

ments" (*The Victims of Crime Assistance Act of 1984: Hearing on S. 2423 Before the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 21 (1984)), and such a provision was included in the bill reported by the Senate Judiciary Committee on May 10, 1984 (S. Rep. No. 497, *supra*, at 4, 13) and passed by the Senate on August 10, 1984 (130 Cong. Rec. 23,803-23,805). That bill was never passed by the House. According to the court of appeals, the next relevant step in the legislative process occurred on October 4, 1984, when the Senate had before it the version of the 1985 continuing appropriations bill, H.R.J. Res. 648, that the House had passed on September 25, 1984 (130 Cong. Rec. H10,131 (daily ed.))—a bill that did not then contain any assessment provision (see *id.* at H11,970 (daily ed. Oct. 10, 1984) (joint explanatory statement of conference committee)). On October 4, according to the court of appeals (App., *infra*, 13a), the Senate "added the text of the Victims of Crime Assistance Act of 1984, including the special assessment provision, to [H.R.J. Res. 648]." 130 Cong. Rec. S13,520, S13,544 (daily ed.). After that amendment, the Senate passed H.R.J. Res. 648 the same day (*id.* at S13,384), and the provision remained in the conference committee's bill (130 Cong. Rec. H11,913 (daily ed. Oct. 10, 1984)), which was approved by both houses (130 Cong. Rec. H12,107, S14,226 (daily ed. Oct. 10, 11, 1984)) and became law on October 12, 1984 (Pub. L. No. 98-473, 98 Stat. 1837).

The court of appeals summarized its reading of the legislative history: "[t]he special assessment provision was introduced in the Senate Judiciary Committee, it was first passed by the Senate and was only adopted by the House on later repassage of H.J. Res. 648." App., *infra*, 13a-14a. Based on that reading, the court concluded that "the Senate clearly initiated the special assessment legislation." App., *infra*, 13a.

c. Finally, the court ruled that Section 3013 was not valid under the proviso to the Origination Clause, which states that "the Senate may propose or concur with Amendments as on other Bills." The court observed that the Senate may attach an amendment to raise revenue to a House bill only if the House bill itself is a revenue-raising measure within the meaning of the Clause. Here, the court concluded, the House-passed version of H.R.J. Res. 648 that the Senate amended on October 4, 1984, was not a bill for raising revenue and so was not validly amended by the revenue-raising Senate amendment. App., *infra*, 14a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held an Act of Congress unconstitutional, and its decision will affect thousands of cases every year. In addition, the court's ruling directly conflicts with several district court decisions, it rests on an interpretation of Section 3013 that conflicts with the views of other courts of appeals, and it is contrary to this Court's Origination Clause decisions. The court of appeals erred both in ruling that Section 3013 was enacted in a "Bill[] for raising Revenue" and in ruling that Section 3013 originated in the Senate.

1. The decision of the court of appeals would invalidate sentences in thousands of cases each year in the Ninth Circuit alone and in tens of thousands more each year if followed in other circuits. By its terms Section 3013 applies to every defendant convicted of a federal crime.[8] Although the court invalidated the original 1984 version of

[8] In the year ending June 1988, there were approximately 40,000 criminal convictions nationwide, approximately 9,000 of which occurred within the Ninth Circuit. Director, Administrative Office of U.S. Courts, *Annual Report 1988*, at 298, 302.

Section 3013, the 1988 amendment, which revised one part of Section 3013(a), only marginally diminishes the reach of the decision.[9]

With respect to felonies, which are subject to Section 3013(a)(2), the 1984 version has not been amended. The Ninth Circuit ruling would therefore invalidate assessments in all felony convictions since the 1984 enactment took effect and indefinitely into the future. The Executive Office of the United States Attorneys has informed us, based on statistics collected from the United States Attorneys' offices, that in the year ending September 30, 1988, more than 27,000 assessments were imposed on felony counts nationwide, and more than 3,700 were imposed in the Ninth Circuit. With respect to misdemeanors and other lesser offenses, which are subject to Section 3013(a)(1), the 1984 law struck down by the court of appeals applied to all criminal convictions until subsection (a)(1) was amended in December 1988. According to the Executive Office, more than 13,000 assessments were imposed on misdemeanor counts annually prior to the amendment, and more than 3,000 in the Ninth Circuit.

The decision of the court of appeals holding Section 3013 invalid has already begun to generate conflicts among the lower courts. Several district court decisions have upheld the statute against such challenges. See, *e.g.*, *United States* v. *Clark*, No. 88 Cr. 0793 (RWS) (S.D.N.Y. Mar. 22, 1989), appeal pending (2d Cir.); *United States* v. *McDonough*, Cr. No. 4-88-137(1) (D. Minn. Feb. 23, 1989), appeal pending (8th Cir.); *United States* v. *Hines*, 88 Cr. 739 (MBM) (S.D.N.Y. Feb. 23, 1989), appeal pending (2d Cir.); *United States* v. *Ramos*, 624 F. Supp. 970,

[9] The 1987 amendment of Section 3013 did not amend subsection (a), which mandates the imposition of the assessments. See note 1, *supra*.

973 (S.D.N.Y. 1985). Other district courts have followed the court of appeals' decision in this case. See, *e.g.*, *United States* v. *Thompson*, CR 88-479A (N.D. Ga. Mar. 20, 1989), appeal pending (11th Cir.); *United States* v. *Culbreath*, No. 88-00186 (M.D. Tenn. Feb. 27, 1989), appeal pending (6th Cir.); *United States* v. *Hamilton*, Cr. No. 88-136 (W.D. Pa. Feb. 15, 1989), appeal pending (3d Cir.); *United States* v. *Simpson*, Cr. No. 88-91 (W.D. Pa. Feb. 15, 1989), appeal pending (3d Cir.); *United States* v. *Williams*, Cr. No. 88-96 (W.D. Pa. Feb. 8, 1989), appeal pending (3d Cir.); *United States* v. *Solomonson*, Cr. No. 3-88-73 (D. Minn. Feb. 6, 1989), appeal pending (8th Cir.). No other court of appeals has yet rejected an Origination Clause challenge to Section 3013, but appeals are now pending in all of the cited recent district court decisions, and the issue is currently being litigated in numerous cases through the nation.

In addition, as the court of appeals in the present case acknowledged (App., *infra*, 11a-12a), the decision below rests on interpretations of Section 3013 that are, at a minimum, in tension with the interpretations adopted by several other courts of appeals in cases not involving the Origination Clause. Two circuits have concluded that Section 3013 was designed to provide funds for the crime victims' assistance programs, *United States* v. *Donaldson*, 797 F.2d 125, 127 (3d Cir. 1986); *United States* v. *Dobbins*, 807 F.2d 130 (8th Cir. 1986), whereas the court in the present case concluded that the provision's primary purpose was not to finance such programs (App., *infra*, 8a-9a, 12a). And three circuits have concluded that the assessments under Section 3013 as enacted were punitive, *United States* v. *Davis*, 845 F.2d 94, 97 n.2 (5th Cir. 1988); *United States* v. *King*, 824 F.2d 313, 317 (4th Cir. 1987); *United States* v. *Mayberry*, *supra* (10th Cir.), whereas the court in the present case concluded that the provision's primary purpose was not to punish offenders (App., *infra*, 10a-12a).

2. a. The court of appeals mistakenly concluded that Section 3013 as enacted was a "Bill[] for raising Revenue" within the meaning of the Origination Clause. This Court has given the Clause a narrow interpretation.[10] The court of appeals' decision is inconsistent with this Court's decisions establishing that the Clause does not apply to legislation that imposes an exaction for a purpose other than the raising of general revenue.

This Court has three times ruled, following Justice Story's analysis of the Origination Clause, that "the practical construction of the Constitution and the history of the origin of the constitutional provision in question proves that revenue bills are those that levy taxes in the strict sense of the word, and are not bills for other purposes which may incidentally create revenue." *Twin City Bank* v. *Nebeker*, 167 U.S. at 202-203. Accord *Millard* v. *Roberts*, 202 U.S. at 436-437; *United States* v. *Norton*, 91 U.S. (1 Otto) at 569.[11] Under that principle, even an as-

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[10] As the court of appeals noted (App., *infra*, 2a-6a), this Court has never held a statute invalid under the Origination Clause, and there appears to be only one decision so holding. That decision, rendered by a district court in 1915, was based on the express declaration of the secretary of the Senate that a bill that was concededly a revenue-raising measure originated in the Senate. See note 5, *supra*.

[11] This understanding of the narrow scope of the Clause is supported by its carefully chosen language, which refers not to bills that raise revenue or to revenue-raising bills or to money bills, but to bills "for" raising revenue. This narrow reading is also supported by the debates on the Clause in the 1787 Convention. See, *e.g.*, 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 263 (1937) (Randolph); *id.* at 273 (Mason); *id.* at 276 (Madison) (noting that the term "revenue" is ambiguous, that many measures would have a revenue purpose as well as another, and that it would often be difficult to determine whether raising revenue was the primary one).

sessment labeled a "tax" by Congress is not necessarily within the strict meaning of the Clause. Thus, in *Nebeker*, the Court rejected an Origination Clause challenge to a provision in a law that established a national currency secured by a pledge of bonds of the United States and that imposed what the statute labeled a tax on notes in circulation. The Court held that the provision was not a revenue-raising measure within the strict sense of the Clause because the tax was designed "to meet the expenses attending the execution of the act" and to accomplish the goal of establishing the currency, rather than "to raise revenue to be applied in meeting the expenses or obligations of the Government." 167 U.S. at 202-203. Similarly, in *Millard*, the Court rejected an Origination Clause challenge to a law levying a tax on property within the District of Columbia in order to raise money for certain railroad construction activity. The Court explained that the measure was not within the Clause because "[w]hatever taxes are imposed are but means to the purposes provided by the act." 202 U.S. at 437. See also *South Carolina* v. *Block*, 717 F.2d 874, 887 (4th Cir. 1983) (50-cent deduction imposed on proceeds of milk sales to defray cost of price-support program and to reduce overproduction not within Origination Clause).

Section 3013 was not enacted in violation of the Origination Clause because it was not designed to raise general revenue for the support of the government. Rather, the provision was enacted as one part of an integrated program to provide assistance to victims of crime. Victims of Crime Act of 1984, Pub. L. No. 98-473, §§ 1401-1405, 98 Stat. 2170-2175. That Act established a Crime Victims Fund and various grant programs to provide such assistance (42 U.S.C. 10601, 10602, 10603 (Supp. II 1984)), and it directed that the special assessments collected under the authority of Section 3013

(along with certain fines and forfeitures) are to be deposited into the Fund (42 U.S.C. 10601(b)(2) (Supp. II 1984)). A measure like Section 3013 that imposes an assessment to support a particular governmental program is not a bill for raising revenue – especially if the program itself is a remedial one designed to address problems caused by the conduct of the class of persons on whom the assessment is imposed.

The court of appeals, while appearing to recognize the *Millard-Nebeker* principle, rejected its application here simply because, in its view, Section 3013 assessments would be available as general revenue. App., *infra*, 8a-9a. There is no adequate basis for that view or the inference the court drew from it. The Senate Committee statement that the assessments "will constitute new income for the Federal government" (S. Rep. No. 497, *supra*, at 14), on which the court placed principal reliance, does not support the court's conclusion. That simple observation would be equally true for any bill that brought in money to fund a particular governmental program, such as the railroad construction program in *Millard* or the currency program in *Nebeker*; the statement does not mean or imply that assessments would be available for general governmental expenditures.

Moreover, the court wholly ignored Congress' command, in the same statute that contained the assessment provision, that assessments are not to be placed in the general fund of the Treasury but are to be deposited in the separate Crime Victim's Fund. 42 U.S.C. 10601 (Supp. II 1984). In fact, moneys from that Fund were to be transferred to the general Treasury only if the Fund reached $100 million (42 U.S.C. 10601(c)(1) (Supp. II 1984)), and that figure has never been reached by the Fund. See U.S. Dep't of Justice, Office for Victims of Crime, Office of Justice Programs, *Victims of Crime Act of 1984: A Report*

to Congress By the Attorney General 11 (1988).[12] In any event, even if excess amounts are eventually transferred, the character of the assessment provision would not change; and nothing in *Millard* or *Nebeker* or the statutes involved there indicates that money raised under the programs at issue would under no circumstances be used as general revenue. Hence, the assessment provision is properly viewed as outside the reach of the Origination Clause because it was designed to finance victim assistance programs rather than to raise general revenue.

In addition, under an appropriately narrow reading of the Origination Clause—and under the principle that "[a] statute * * * is to be construed, if such a construction is fairly possible, to avoid raising doubts of its constitutionality," *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 780 (1981)—Section 3013 as enacted should have been upheld because, like fines and forfeitures, the assessments should be characterized as penal. There are several bases for such a characterization. Assessments are imposed only on convicted criminals, and they are imposed as part of the sentence. Section 3013(b) directs that assessments are to "be collected in the same manner that fines are collected in criminal cases." The provision directing that assessments be deposited in the Crime Victims' Fund refers to them as "penalty assessments." 42 U.S.C. 10601(b)(2) (Supp. II 1984). And the statute that added Section 3013 to the Criminal Code did so in a provision, Section 1405(a), that was labeled "penalty assessment." 98 Stat. 2174.[13] Under those circumstances, a court seeking to avoid rather than invite a constitutional question would have construed the provision to be a penal measure and not to be a strict measure for raising revenue subject to the Origination Clause.

[12] The $100 million cap has since been raised. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7121(a), 7129, 102 Stat. 4419, 4423; Children's Justice and Assistance Act of 1986, Pub. L. No. 99-401, § 102(b)(1), 100 Stat. 904.

b. Even if the court of appeals were correct that Section 3013 as enacted came within the scope of the Origination Clause, the decision would still be wrong. The court erred in concluding that the assessment provision originated in the Senate. That conclusion rests on a mistaken reading of the legislative history and on an insufficient appreciation of the "practical construction" (*Nebeker*, 167 U.S. at 202) that must be given, and has been given by Congress itself, to the Clause.

It is true, as the court of appeals stated (App., *infra*, 13a), that the Senate in the 98th Congress was the first of the two houses to pass an assessment provision. But the court incorrectly suggested that it was that provision, Section 201 of S. 2423, which the Senate added to H.R.J. Res. 648 on October 4, 1984. While the Senate's October 4th amendment was identical to the provision ultimately enacted (see 130 Cong. Rec. S13,520, S13,544 (daily ed.)), S. 2423 is different in wording and structure.[14] What the

[13] The Senate's use of "penalty assessments" in its first assessment provision lends additional support. See p. 7, *supra*. Contrary to the court of appeals' suggestion (App., *infra*, 10a-11a), there is no indication that Congress altered its understanding of the assessment provision when it changed "penalty assessments" to "special assessments."

[14] Section 201 of S. 2423 stated (130 Cong. Rec. 23,805 (1984)):

PENALTY ASSESSMENT FEES

Sec. 201. Whenever any person is convicted of an offense in any court of the United States, the court shall impose a penalty

Senate added to H.R.J. Res. 648 was actually the text of a provision of a House bill—Section 1005 of H.R. 5690, 98th Cong., 2d Sess. (1984)—that the House had passed two days earlier, on October 2, 1984. 130 Cong. Rec. H10, 721, H10,859 (daily ed.).[15] Hence, the first house to pass the assessment provision that was enacted into law was the House of Representatives, not the Senate. And what the Senate did by its October 4th amendment was nothing more than to take two House-passed bills and to merge part of one into the other.

Where, as here, the House is the first actually to pass the precise measure in question, the measure must be found to have originated in the House, even though a similar measure had earlier been passed by the Senate. Although other conditions would doubtless also be sufficient to find House origination, one sensible and readily applicable test for origination is which house first passed the particular measure that was ultimately enacted. That conclusion also follows *a fortiori* from the well-established prerogative of the House, upon being presented with a Senate-originated bill for raising revenue, to insert the Senate's language into

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assessment fee on such person in the amount of—

(a) $25, if the defendant is an individual and the offense is a misdemeanor;

(b) $50, if the defendant is an individual and the offense is a felony;

(c) $100, if the defendant is a person other than an individual and the offense is a misdemeanor; and

(d) $200, if the defendant is a person other than an individual and the offense is a felony.

[15] Section 1005 of the House bill is identical to Section 405 of H.R.J. Res. 648—the section adding Section 3013 to the criminal code—as it was enacted into law as Pub. L. No. 98-473.

a House bill, pass the new bill, and send it to the Senate.[16] Since the House may do that, it may also, upon being presented a Senate-originated revenue bill, insert a *modified* version of that bill into a new House bill. The fact that the new House bill "originated" in the House is not altered in any way when that bill and another House bill are combined by the Senate into a single bill.

In the present case, the House bill, H.R. 5690, was not simply a modified version of the earlier Senate-passed measure, S. 2423. It was an accommodation of S. 2423 and several other measures, including another House bill, H.R. 3498, 98th Cong., 1st Sess. (1983).[17] Rep. Rodino explained the origins of the Senate amendments to H.R.J. Res. 648 and hence of the conference bill (130 Cong. Rec. H12,084 (daily ed. Oct. 10, 1984)):

> The other body early last August passed a modified version of the administration bill, and shortly after that I began negotiations with the administration and the leadership of the other body's Judiciary Committee. Those negotations successfully resolved the dif-

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[16] See generally 3 L. Deschler, *Deschler's Precedents of the United States House of Representatives* §§ 13-18, at 292-312 (1974) (H.R. Doc. No. 661, 94th Cong., 2d Sess. (1974)); 2 A. Hinds, *Hinds' Precedents of the House of Representatives* §§ 1484, 1485, 1495, at 943-969 (1907). Without that prerogative, the House could be entirely precluded by the Senate from adopting a given revenue measure if the Senate simply passed it first. That would not only be practically intolerable but would turn the Origination Clause's protection of a House prerogative on its head.

[17] In light of the court of appeals' statement that "[t]he special assessment provision was introduced in the Senate Judiciary Committee" in May 1984 (App., *infra*, 13a-14a), it is worth noting that Rep. Rodino introduced H.R. 3498 on June 30, 1983, and that H.R. 3498 is far closer to the enacted bill in language and structure than is S. 2423. See U.S. Dep't of Justice, Office of Justice Programs, *Indexed Legislative History of the Victims of Crime Act of 1984*, at 176 (1985).

> ferences among the three bills—H.R. 3498, the administration bill, and the bill passed by the other body. I introduced the compromise that we worked out—H.R. 6403—which was also included in the crime package amendments to H.R. 5690 that were approved by the House on Tuesday, October 2. The other body attached the compromise to the continuing resolution, and the House's conferees agreed to accept the language.

In short, the bill that enacted Section 3013 into law originated in the House for purposes of the Origination Clause.

c. The foregoing conclusions are bolstered by a number of considerations that strongly counsel against judicial invalidation of statutes under the Origination Clause. To begin with, this Court has at least implicitly suggested that policing compliance with the Clause might be a matter for Congress alone. Thus, based on the ruling in *Field* v. *Clark*, 143 U.S. 649 (1892), that a court should not look behind the signatures of the Speaker and the President of the Senate on an enrolled bill to determine whether the signed bill omitted a provision included in the bill upon its passage, the Court has on three occasions expressly reserved the question whether it is ever appropriate for a court to examine the Journals of Congress to determine in which house a bill that has been passed by both houses and signed by the President in fact originated. *Rainey* v. *United States*, 232 U.S. 310, 317 (1914); *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 143 (1911); *Nebeker*, 167 U.S. at 203.[18]

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[18] The Fifth Circuit in *Texas Ass'n of Concerned Taxpayers, Inc.* v. *United States*, 772 F.2d 163 (1985), cert. denied, 476 U.S. 1151 (1986), held nonjusticiable the question whether a bill that reduced taxes was

In addition, the Senate and House of Representatives have a strong reliance interest in the continuation of at most a modest judicial role under the Origination Clause. No court has struck down any statute under the Clause, except for the lone 1915 district court decision that involved an express congressional declaration of Senate origin of a concededly revenue-raising bill—a matter of labels entirely within Congress's control. See note 5, *supra*. Various House precedents clearly exhibit reliance on a limited judicial role. See, *e.g.*, 6 C. Cannon, *Cannon's Precedents of the House of Representatives* § 314, at 448 (1935) (Origination Clause objection in House untimely once bill went to conference); *id.* § 315, at 448-449 (discussing "differentiation between bills for the purpose of raising revenue and bills which incidentally raise revenue"); 2 A. Hinds, *Hinds' Precedents of the House of Representatives* § 1491, at 954 (1907) (discussing untimeliness of Origination Clause objection). As a practical matter, Congress has enacted legislation against the background of the lenient standards of this Court's and other courts' decisions.

Furthermore, the House and Senate have long paid close attention to the enforcement of the Origination Clause. See, *e.g.*, 2 A. Hinds, *supra*, § 1481, at 942 (discussing 1807 precedent); H.R. Doc. No. 279, 99th Cong., 2d Sess. 43-44 (1987) (House annotation of Origination Clause, citing to rules and precedents). The House's ability to enforce its prerogatives under the Clause

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a bill for raising revenue within the meaning of the Origination Clause.

Indeed, it is not entirely clear whether it is possible to formulate judicially manageable standards to determine in all cases whether a bill is truly a revenue bill "in the strict sense" or whether a bill "originated" in the House, given that many bills have mixed purposes, that "origination" has no single obvious meaning, and the need for congressional flexibility.

strengthens the case for viewing the Clause at least primarily as an internal rule of procedure not calling for aggressive judicial supervision. Cf. *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (federalism limits of Tenth Amendment enforceable principally through the political process). Such a view of the Clause is also suggested by the difficulty of identifying what concrete protections the Clause today affords the citizenry. While the British rule that money bills must originate in the House of Commons, with the House of Lords entitled only to approve or disapprove, reflected the unrepresentative character of the Lords, that concern was always of limited applicability to our government (see J. Story, *Commentaries on the Constitution* §§ 445, 446, at 315-317 (R. Rotunda & J. Nowak ed. 1987)), and it is especially so now that the Senate is popularly elected. U.S. Const. Amend. XVII.[19] Hence, as the court of appeals in the present case acknowledged, "diminished concern about the Senate's lack of accountability has largely undermined the clause's rationale." App., *infra*, 4a (footnote omitted).

Accordingly, in addition to the ordinary principle requiring statutes to be construed to avoid constitutional difficulties, considerations distinctive to the Origination Clause counsel caution in the judicial invalidation of a duly enacted statute under the Clause. The court of appeals' decision here did not display the needed caution.

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[19] The Framers drew the Origination Clause from the British rule, but like most of the States prior to 1787, they deliberately departed from the British model by, inter alia, permitting the Senate to amend House bills for raising revenue. See, *e.g.*, 1 M. Farrand, *supra*, at 233 (Madison); 2 *id.* at 278 (Dickenson); *id.* at 279 (Rutlidge); 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 376 (2d ed. 1836) (Madison).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 86-5236

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GERMAN MUNOZ-FLORES, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Southern District of California

[Filed Dec. 12, 1988]

Before WRIGHT, FERGUSON and O'SCANNLAIN, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

In this appeal of the denial of a motion to set aside a sentence imposing two twenty-five dollar special assessments for immigration law violations, German Munoz-Flores ("Munoz") contends that passage of the Special Assessment on Convicted Persons (18 U.S.C. § 3013 (1984)) did not comply with the requirements of the origination clause of the Constitution.

We find that the constitutionality of the Special Assessment on Convicted Persons is squarely presented in this

appeal. An analysis of the legislative history of the statute persuades us that the enactment of the special assessment failed to comply with the constitutionally mandated procedure. We therefore vacate that portion of the court's sentencing order imposing special assessments.

FACTS AND PROCEEDINGS

After pleading guilty to two counts of aiding and abetting an alien to elude examination and inspection in violation of 18 U.S.C. § 2 and 8 U.S.C § 1325, Munoz was sentenced to two years unsupervised probation and ordered to pay special assessments of $25 for each count, pursuant to 18 U.S.C. § 3013.

Munoz moved to correct this sentence under Fed.R. Crim.P. 35(a), asserting that the special assessments were invalid because the legislation authorizing these assessments originated in the Senate contrary to article I, § 7 of the Constitution. The magistrate denied the motion, finding the assessment constitutional, and the district court affirmed. Munoz timely appeals.

ANALYSIS

I

JUSTICIABILITY

Before turning to the merits of Munoz's constitutional claim, we must consider whether an origination clause challenge to a statute implicates the political question doctrine, rendering the issue inappropriate for judicial determination. The Supreme Court has indicated that an issue is nonjusticiable when one of the following circumstances is present: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "a lack of judicially discoverable and manage-

able standards for resolving it"; (3) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a political decision already made"; or (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *INS v. Chadha,* 462 U.S. 919, 941, 103 S.Ct. 2764, 2779, 77 L.Ed.2d 317 (1983) (quoting *Baker v. Carr,* 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962)).

The instant case presents none of these factors. The text of the origination clause does not commit its interpretation to the political branches. The standards of the clause are clear, and its application requires no policy determinations. The determination of which house a bill originated in and whether it raises revenue are questions the courts are functionally well-equipped to answer. Finally, this case does not implicate prudential considerations of deference to the decisions of another governmental branch. Although mechanisms allowing Congress itself to question the constitutionality of a bill under the origination clause exist[1], the failure of Congress to inquire whether a statute violates the origination clause should not preclude the courts from doing so. Certainly this court should not interpret Congress' silence on an origination clause issue to preclude judicial examination, when it has refused to draw such a conclusion from Congress' explicit finding that a bill did not violate the origination clause. *See Armstrong*

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[1] A resolution asserting the House's constitutional prerogatives is the usual method of legislatively asserting origination clause issues. *See* 3 Deschler's Precedents of the United States House of Representatives § 13 (1974).

v. United States, 759 F.2d 1378, 1380 (9th Cir.1985) ("Although Congress has an obligation to enact legislation that it deems to be constitutional, its determination that a particular statute is constitutional does not foreclose or relieve this court from conducting its own analysis of that issue"). *But cf. Texas Assoc. of Concerned Taxpayers v. United States,* 772 F.2d 163, 166-67 (5th Cir.1985) (refusing to analyze a statute under the origination clause on the grounds that Congress had itself previously determined that the statute in question did not violate the origination clause), *cert. denied,* 476 U.S. 1151, 106 S.Ct. 2265, 90 L.Ed.2d 710 (1986). Holding the origination clause justiciable also comports with a number of Supreme Court decisions in which the Court adjudicated origination clause challenges to statutes. *See, e.g., Flint v. Stone Tracy Co.,* 220 U.S. 107, 142-43, 41 S.Ct. 342, 345-46, 55 L.Ed. 389 (1911).

Therefore, we consider the merits of Munoz's claim.

II

THE ORIGINATION CLAUSE

The origination clause provides that "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7. The origination requirement was intended to grant primary power over taxation to the house more closely tied to the popular will. *See* 2 P. Kurland & R. Lerner, *The Founders' Constitution* 376 (1987). Although diminished concern about the Senate's lack of accountability has largely undermined the clause's rationale[2], the requirement of

[2] Almost eighty years ago, Charles Beard dismissed the origination clause in the following terms: "It can hardly be said that it constitutes any safeguard against careless and corrupt finance in legislatures; and it must be admitted also that it has slowly been declining in public esteem." C. Beard, *American Government & Politics* 706-07 (1910).

origination in the House persists and in recent years has been the basis of a number of statutory challenges. *See, e.g., Sperry Corp. v. United States,* 12 Cl.Ct. 736 (1987) (rejecting an origination clause challenge to the Iran Claims Act), *reversed on other grounds,* 853 F.2d 904 (Fed.Cir.1988); *Armstrong,* 759 F.2d at 1378 (upholding the Tax Equity and Fiscal Responsibility Act of 1982 against an origination clause challenge).[3] Indeed, one decision struck down a statute on the grounds that it violated article I, § 7. *Hubbard v. Lowe,* 226 F. 135 (S.D.N.Y.

[3] Other cases construing the origination clause include: *United States v. Norton,* 91 U.S. 566, 23 L.Ed. 454 (1875); *Twin City Bank v. Nebeker,* 167 U.S. 196, 17 S.Ct. 766, 42 L.Ed. 134 (1897); *Millard v. Roberts,* 202 U.S. 429, 26 S.Ct. 674, 50 L.Ed. 1090 (1906); *Flint v. Stone Tracy Co.,* 220 U.S. 107, 31 S.Ct. 342, 55 L.Ed. 389 (1911); *Rainey v. United States,* 232 U.S. 310, 34 S.Ct. 429, 58 L.Ed. 617 (1914); *United States ex rel. Michels v. James,* 26 F.Cas. 577 (S.D.N.Y.1875) (No. 15,464); *United States v. Billings,* 190 F. 359 (S.D.N.Y.1911), *rev'd on other grounds sub. nom., Pierce v. United States,* 232 U.S. 290, 34 S.Ct. 427, 58 L.Ed. 609 (1914); *Bertelsen v. White,* 65 F.2d 719 (1st Cir.1933); *Mulroy v. Block,* 569 F.Supp. 256 (N.D.N.Y.1983), *aff'd,* 736 F.2d 56 (2d Cir.1984), *cert. denied,* 469 U.S. 1159, 105 S.Ct. 907, 83 L.Ed.2d 922 (1985); *Moon v. Freeman,* 379 F.2d 832 (9th Cir.1967) (dicta); *United States v. Ramos,* 624 F.Supp. 970 (S.D.N.Y.1985); *Leary v. United States,* 395 U.S. 6, 21, 89 S.Ct. 1532, 1540, 23 L.Ed.2d 57 (1969); *State v. Block,* 717 F.2d 874 (4th Cir.1983), *cert. denied,* 465 U.S. 1080, 104 S.Ct. 1444, 79 L.Ed.2d 764 (1984); *Swearingen v. United States,* 565 F.Supp. 1019 (D.Colo.1983); *Edwards v. Carter,* 580 F.2d 1055 (D.C.Cir.), *cert. denied,* 436 U.S. 907, 98 S.Ct. 2240, 56 L.Ed.2d 406 (1978). Recently, the controversy surrounding the passage of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) has produced a large number of origination clause cases. These cases have uniformly upheld TEFRA as not violative of the origination clause. *See, e.g., Hudson v. United States,* 766 F.2d 1288 (9th Cir.1985).

1915), *appeal dismissed,* 242 U.S. 654, 37 S.Ct. 12, 61 L.Ed. 547 (1916).

Munoz asserts that the adoption of section 3013 violated article I, § 7. The analysis of an origination clause issue is straightforward and tracks the language of the clause. First, we must gauge whether the statute falls within the class of revenue raising bills covered by the clause. If the bill is one that raises revenue within the meaning of art. I, § 7, the court must next determine if the bill originated in the House, as required by the clause. Finally, the court must examine whether the Senate's participation in the legislative process can be construed as an amendment permissible under the clause. With these guidelines in mind, we turn to an examination of the challenged statute.

A. *Is the Special Assessment a Revenue Bill?*[4]

By its terms, the origination clause applies only to bills that raise revenue. However, the fact that a statute produces governmental income is not dispositive. Supreme Court decisions hold that origination clause constraints do not extend to bills that incidentally create revenue if those bills were enacted for purposes other than revenue raising. *See, e.g., Millard,* 202 U.S. at 436, 26 S.Ct. at 675; *Nebeker,* 167 U.S. at 202, 17 S.Ct. at 768-69; *Norton,* 91 U.S. at 569.

These precedents mandate an inquiry into the purposes of the special assessment legislation to determine if the challenged statute is a "Bill[ ] for raising Revenue" within the meaning of the origination clause. The relevant question is: was the special assessment statute enacted "for the direct and avowed purpose of creating revenue or public funds for the service of the government"? *Norton,* 91 U.S.

[4] The "bill" under consideration is the statute providing for the collection of special assessments.

at 569 (quoting *United States v. Mayo,* 26 F.Cas. 1230 (C.C.D.Mass.1813) (No. 15,755) (interpreting the term "revenue law" in the context of an 1804 federal crimes act)).

To determine the purpose of the special assessment we first turn to the language of the statute. Section 3013 provides:

> (a) The court shall assess on any person convicted of an offense against the United States
>
> (1) in the case of a misdemeanor
>
> (A) the amount of $25 if the defendant is an individual; and
>
> (B) the amount of $100 if the defendant is a person other than an individual; and
>
> (2) in the case of a felony
>
> (A) the amount of $50 if the defendant is an individual; and
>
> (B) the amount of $200 if the defendant is a person other than an individual.
>
> (b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.
>
> (c) The obligation to pay an assessment ceases five years after the date of the judgment.
>
> (d) For the purposes of this section, an offense under section 13 of this title is an offense against the United States.

On its face, the statute offers little insight into its underlying purpose. The subsection requiring that the assessments be collected in the same manner as criminal fines might be read to suggest that the assessment is analogous to a criminal fine, and thus is punitive. However, the wording does not indicate explicitly that the special assessment is meant to punish, and the subsection addressing

collection may be interpreted as a purely procedural requirement. Most important, the language fails to limit or even to describe the use of the collected funds. This lack of restriction suggests that the revenue raising aspect of the bill is not subsidiary to any enunciated function.

Because the statutory language is ambiguous, we examine legislative history to infer Congress' intent. *See Blum v. Stenson,* 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). In its report, the Senate Committee on the Judiciary states:

> The purpose of imposing nominal assessment fees is to generate needed income to offset the cost of the [victims' assistance fund] authorized under S. 2423. Although substantial amounts will not result, these additional amounts will be helpful in financing the program *and will constitute new income for the Federal government.*

S.Rep. No. 497, 98th Cong., 2d Sess. 13-14 (1984), *reprinted in* 1984 U.S.Code Cong. & Admin.News 3182, 3607, 3619-20 [hereinafter S.Rep. No. 497] (emphasis added).

This statement of purpose and the testimony by the provision's sponsor, Senator Heinz, *see The Victims of Crime Assistance Act of 1984: Hearings on S. 2423 Before the Senate Comm. on the Judiciary,* 98th Cong., 2d Sess. 21 (1984) [hereinafter *Hearings*], demonstrate that the special assessment was in part intended to contribute to a fund to help defray the costs of eligible state criminal victim assistance programs. *See* 42 U.S.C. §§ 10601(b)(2), 10602. Had the proceeds been clearly confined to this purpose, the bill might well have passed constitutional muster. Its purpose might have been held not to be the raising of revenue, despite the fact that the goal of funding state criminal victim assistance programs could have been accomplished only

by the raising of revenue. *See, e.g., Millard,* 202 U.S. at 436-37, 26 S.Ct. at 675 (holding that a bill providing payment to a railway company of money raised by a tax on District property was not a revenue raising bill within the compass of the origination clause); *cf. Sperry,* 12 Cl.Ct. at 742-43 (upholding against an origination clause challenge an act that authorized deductions from awards of the Iran Claims Tribunal because the purpose of the act was to expedite the settlement of claims against Iran and to shift the cost of maintaining the tribunal to those who benefit most from it).

However, as the underlined passage of the statement of purpose indicates, Congress contemplated that the revenue might be used as general federal revenue.[5] In addition, Congress failed to restrict the use of the monies assessed under section 3013 in any way, so that they might be shifted to another purpose at any time. A final indication of the fact that the special assessment's main purpose was not to fund victim assistance programs is the concession by Congress in its statement of purpose that only small amounts would be collected by the assessments.

---

[5] The testimony of Lois Herrington, Assistant Attorney General, before the Senate Judiciary Committee also supports this position. When asked about the administration's position on the proposed special assessments, Herrington stated:

> Well, when we first looked into this on the task force, we looked into the size of the source of the funding and whether it would be really worthwhile to go after this, how much it would cost us to get it. We figured out it would be approximately $2 million as a fund. *There are also several other proposals within the Department of Justice looking into how to use it in the criminal justice area.* Because of the increase in the fine collection in the last year, we did not use this as a source of funding. It is a very small amount in the total fine collection.

Hearings, supra, at 36 (emphasis added).

The government urges that we find the purpose of the special assessment to be the punishment of offenders, rather than the collection of revenue. A number of arguments are offered in support of this position. First, in the legislative history, the assessment is referred to as a "penalty assessment." Second, the special assessment is levied only on convicted persons. Third, several circuits have held the special assessments to be penal in nature. We find these arguments unpersuasive, and address them in turn.

First, the term used to refer to the assessment does not determine its purpose. "Penalties" are defined functionally, by their effect, rather than by the word used to describe them. If the special assessment is intended to raise revenue for government use, rather than to punish offenders, the name by which it is called is irrelevant. *See United States v. La Franca,* 282 U.S. 568, 572, 51 S.Ct. 278, 280, 75 L.Ed. 551 (1931). In addition, although the Senate hearing report, S.Rep. No. 497, *supra,* at 5, 13, 1984 U.S.Code Cong. & Admin.News, at 3611, 3619 and the original bill used the term "penalty assessment," the word "penalty" does not appear in the codified version of the statute. Instead, the term "special assessment" is used. 18 U.S.C. § 3013. This suggests that Congress, by altering the reference, may not have conceived of the assessment, at least in its final form, as a penalty. Finally, as discussed above, the legislative statement of purpose does not mention punishment as a purpose of the special assessment.

Second, the fact that the special assessment exacts money only from convicted persons does not necessitate that its purpose be punitive. The special assessment could also be interpreted as an expression of Congress' power to tax under art. 1, § 8 of the Constitution. "[T]he Framers did not intend to restrict Congress' ability to define the class of objects to be taxed." *United States v. Ptasynski,*

462 U.S. 74, 82, 103 S.Ct. 2239, 2244, 76 L.Ed.2d 427 (1983). Therefore, a levy on the class of convicted persons may be a tax, rather than a penalty.

Third, although a number of courts have found the special assessment statute to be punitive, all but one decision involved contexts other than the origination clause. *See United States v. Mayberry,* 774 F.2d 1018 (10th Cir.1985) (holding that the special assessment is a form of punishment for purposes of the Assimilative Crimes Act); *United States v. Davis,* 845 F.2d 94, 97 n. 2 (5th Cir.1988) (same); *United States v. King,* 824 F.2d 313, 317 (4th Cir.1987) (interpreting *Ray v. United States,* 481 U.S. 736, 107 S.Ct. 2093, 95 L.Ed.2d 693 (1987) (to imply that the special assessment was punitive, and therefore constituted punishment for purposes of the Assimilative Crimes Act). *But cf. United States v. Donaldson,* 797 F.2d 125, 127 (3d Cir.1986) (finding that rule of lenity does not govern the interpretation of § 3013, because the statute is not criminal, as the purpose of the section is to raise revenue to support state crime victim compensation programs); *United States v. Dobbins,* 807 F.2d 130 (8th Cir.1986) (same).

These courts, in evaluating the purpose of section 3013 in light of challenges that did not involve the origination clause, unsurprisingly failed to perform the purpose analysis mandated by the origination clause. The importance of that failure can be seen by examining a decision of this court. In *United States v. Smith,* 818 F.2d 687 (9th Cir.1987), the Ninth Circuit held that the Congress intended section 3013 to be "a punitive measure designed to raise some revenue," concluding that "[a] punitive measure designed to raise revenue is still a punitive measure." *Id.* at 690. *Smith* is distinguishable from the present case, however, because the determination that the special assessment was a punishment was relevant only in determining that its

imposition on the defendants without resort to a jury trial did not violate their seventh amendments rights. The court did not explore the further constitutional implications of the finding that "Congress undeniably intended section 3013 assessments to produce revenue." *Id. Smith* did not determine the "primary purpose" of the special assessment nor did it consider whether it was a tax within the meaning of the origination clause.

We decline to follow the one case that rejected an origination clause challenge to section 3013, holding that section 3013 was punitive for purposes of the origination clause. *See United States v. Ramos*, 624 F.Supp. 970, 973 (S.D.N.Y.1985). *Ramos* conducted a one-paragraph analysis of the origination clause issue and adopted the holding of *Mayberry* that the measure was punitive, ignoring the fact that *Mayberry* did not involve an origination clause challenge.

We conclude, therefore, that for purposes of the origination clause the primary purpose of the special assessment was to raise revenue, not to finance state victim assistance programs or to punish offenders. Because section 3013 is a bill for raising revenue, the Constitution requires that the special assessment legislation have originated in the House of Representatives. We will now examine the legislative history to determine whether the legislation complied with this prescription.

B. ***In Which House Did Section 3013 Originate?***

Although the parliamentary history of section 3013 is somewhat complex, it clearly indicates that section 3013 originated in the Senate. The history of the bill's passage is in general outline as follows. *See generally The Crime Control and Fine Enforcement Acts of 1984: A Synopsis*, Federal Judicial Center (1985) (summarizing the Comprehensive Crime Control Act's legislative history).

On May 1, 1984, in hearings on S. 2423, the Victim of Crime Assistance Act of 1984, before the Senate Committee on the Judiciary, Senator John Heinz proposed a provision allowing for the collection of "penalty assessments" from convicted persons. *See Hearings, supra,* at 21. On May 10, 1984, the Committee on the Judiciary ordered the bill reported, including the newly added section authorizing the collection of special assessments. *See* S.Rep. No. 497, *supra,* at 3, 1984 U.S.Code Cong. & Admin.News, at 3609. The Senate passed S. 2423 on August 10, 1984. *See* 1984 U.S.Code Cong. & Admin.News 3607. This bill was never passed by the House. However, on October 4, 1984, the Senate added the text of the Victims of Crime Assistance Act of 1984, including the special assessment provision, to a joint resolution making continuing appropriations for the fiscal year 1985 (H.J.Res. 648). Thurmond Amendment No. 7043, 98th Cong., 2d Sess., 130 Cong. Rec. S13,520, S13,544 (daily ed. Oct. 4, 1984). Although H.J.Res. 648 had been approved by the House on September 28, 1984, as passed by the House the joint resolution contained no provision relating to special assessments. *See* Joint Explanatory Statement of the Committee of Conference, 1984 U.S.Code Cong. & Admin.News 3710, 3713-14. The provision establishing the special assessments ultimately became part of the Comprehensive Crime Control Act of 1984, itself forming one of many unrelated titles in H.J.Res. 648 as adopted by the House on October 10, 1984 pursuant to the conference agreement. *See id.* The Senate passed the modified version of H.J.Res. 648 on October 11, 1984, and the bill became law on October 12, 1984 (Pub.L. No. 98-473).

Although section 3013 ultimately passed both houses of Congress as a minor component of the continuing appropriations resolution for 1985, the Senate clearly initiated the special assessment legislation. The special assessment

provision was introduced in the Senate Judiciary Committee, it was first passed by the Senate and was only adopted by the House on later repassage of H.J.Res. 648. Based on this reading of the legislative history, we hold that section 3013 originated in the Senate.

C. *Can the Senate's Passage of Section 3013 be Construed as a Permissible Germane Amendment of a House Revenue Bill?*

Our holdings that section 3013 is a revenue bill and that it originated in the Senate do not require that we find the legislation violative of the origination clause. The Constitution permits the Senate to "propose or concur with Amendments as on other Bills." U.S. Const. art. I, § 7. However, the power of the Senate to amend a bill originating in the House is not unlimited. The Senate's amendment must be germane to the subject matter of the House bill. *See Flint,* 220 U.S. at 143, 31 S.Ct. at 346; *Armstrong,* 759 F.2d at 1381. The Senate has conceded that the Senate's authority to attach revenue-raising amendments to House bills applies only to revenue bills. 2 Hinds' Precedents of the House of Representatives of the United States § 1489 (1907); *see also Armstrong,* 759 F.2d at 1382. ("[O]nce a revenue bill has been initiated in the House, the Senate is fully empowered to propose amendments").

House joint resolution 648 did not deal with the raising of revenue. As the district court correctly noted, "the subject matter of the House bill in this case was crime control – not raising revenue. Thus, regardless of the effect of the 'amendment,' the 'amended portion' of the legislation did not address revenue collection. . . ." *United States v. Munoz-Flores,* Crim. No. 85-0509-E (S.D.Ca. Aug. 6, 1986) (memorandum decision) at 7 n. 3. The Senate's amendment relating to revenue raising was not an amendment to a revenue bill within the meaning of the origination clause.

III.

CONCLUSION

Statutes should be construed to avoid constitutional questions; however, this tenet of statutory construction is not a license for the judiciary to overlook procedural errors by the legislative branch that violate the Constitution. *Cf. United States v. Albertini,* 472 U.S. 675, 680, 105 S.Ct. 2897, 2902, 86 L.Ed.2d 536 (1985) (judiciary may not rewrite language enacted by the legislature to avoid a constitutional question).

The primary purpose of section 3013 is revenue raising; the legislation originated in the Senate, and the special assessment cannot be interpreted as an amendment of a House revenue bill. We therefore find that the special assessment is violative of article I, § 7. As such, the special assessment is "not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County,* 118 U.S. 425, 442, 6 S.Ct. 1121, 1125, 30 L.Ed. 178 (1886).

Because we hold that the special assessment on convicted persons is unconstitutional, we do not reach other issues raised by Munoz.

SENTENCE VACATED IN PART.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Crim. No. 85-0509-E

UNITED STATES OF AMERICA, PLAINTIFF

v.

GERMAN MUNOZ-FLORES (07), DEFENDANT

MEMORANDUM DECISION

[Entered Aug. 11, 1986]

BACKGROUND

Defendant and several codefendants were charged in a two count indictment with aiding and abetting in the transportation of illegal aliens. Prior to trial, the United States and defendant Munoz-Flores entered into a plea agreement, and the defendant consented to the jurisdiction of the magistrate's court.

Pursuant to the government's recommendation, Magistrate Gonzalez ordered a suspended sentence on both counts and placed the defendant on two years of unsupervised probation. The disposition and sentencing took place on September 20, 1985. A transcript of the proceedings is in the file before this court.

In addition to ordering probation, Magistrate Gonzalez ordered the defendant to pay two $25.00 special assessment penalties. The order reflected defendant's conviction on two misdemeanor counts.

Counsel for defendant objected to the special assessments, arguing that there should be only one special assessment penalty per offense. Magistrate Gonzalez overruled the objection and the defendant paid both special assessment penalties.

The judgment and commitment against defendant, which included the special assessments, was filed on September 30, 1985. Defendant did not appeal. However, on October 15, 1985, defendant filed a Rule 35 motion to correct the sentence. Fed. R. Crim. P. 35.

In his Rule 35 motion, defendant raised three objections to Magistrate Gonzalez' imposition of sentence:

(1) 18 U.S.C. § 3013 (1982), authorizing special assessment penalties, is a revenue raising statute that unconstitutionally originated in the United States Senate.
(2) Multiple assessments may not be imposed for a single transaction or offense, regardless of the number of counts in the indictment.
(3) Special assessment penalties may not be imposed for petty offenses.

On December 11, 1985, Magistrate Gonzalez denied defendant's motion. The defendant now appeals the magistrate's denial of the Rule 35 motion, urging the same three legal questions that were presented below. This court has jurisdiction over the appeal pursuant to 18 U.S.C. § 3402.

DISCUSSION

I.

Constitutionality of § 3013

Defendant attacks the constitutionality of § 3013, 18 U.S.C. § 3013, based on the origination clause of the Constitution. U.S. Const. art. I, § 7, cl. 1. The origination clause provides:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

The language of section 3013 does not itself indicate whether the statute is intended to raise revenue or was passed for other purposes. Section 3013 states:

> The court shall assess on any person convicted of an offense against the United States –
>
> (1) in the case of a misdemeanor –
>
> (A) the amount of $25 if the defendant is an individual . . .
>
> Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

18 U.S.C. § 3013 (1982).

It is well established that the origination clause does not invalidate statutes that are primarily regulatory or penal, but which raise revenue incidentally. Thus, the origination clause is directed at statutes that levy a tax.[1] The Court of Appeals for the Fourth Circuit recently summarized:

---

[1] Defendant relies on two district court cases that concerned states' competence to tax federal institutions. *United States v. Maine*, 524 F. Supp. 1056 (D. Me. 1981); *United States v. Maryland*, 471 F. Supp. 1030 (D. Md. 1979). These cases address the distinction between a fee and a tax; although pertinent these cases are not dispositive concerning whether section 3013 has a primary purpose other than raising revenue.

> The deduction, however, is not a tax. The mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised. *Head Money Cases*, 112 U.S. 580, 5 S. Ct. 247, 28 L.Ed. 798 (1884). The imposition of assessments have long been held to be a legitimate means of regulating commerce. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942). If regulation is the primary purpose of a statute, revenue raised under the statute will be considered a fee rather than a tax. *United States v. Strangeland*, 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943).

State of South Carolina ex rel. Tindal v. Block, 717 F.2d 874, 887 (4th Cir. 1983).

Chapter XIV of the Crime Control Act of 1984 established the Crime Victims' Assistance Fund to provide compensation and assistance for programs for crime victims. The Fund accrues money from (1) all criminal fines from federal cases, (2) contributions from the public, (3) "all penalty assessment fees imposed by a Federal court upon conviction pursuant to Title II of the Act [section 3013]," and (4) royalties paid to convicts.

Title II, containing section 3013, is denominated "Penalty Assessment Fines." The Senate Report covering its passage explains:

> Section 101 requires and prescribes penalty assessment fees to be imposed by the Federal courts upon defendants convicted of offenses. The penalty fee for individual defendants is $25 for a misdemeanor conviction and $50 for a felony conviction . . . The Committee's amendment added this title to the bill based on a suggestion from Senator Heinz. [Footnote omitted]. The purpose of imposing nominal assess-

> ment fees is to generate needed income to offset the cost of the new programs authorized under S. 2423. Although substantial amounts will not result, these additional amounts will be helpful in financing the program and will constitute new income for the Federal government.

S. Rep. 98-497, at 13-14, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code & Cong. Ad. News p. 3607, 3619-20. The Senate Report also addresses the cost of the new legislation. It summarizes:

> While the bill would authorize new spending, the increased fines, improved collections, penalty assessment fees, and public donations could conceivably offset much of that spending authority.

Id. at 3627.

Thus, the language and the legislative history of section 3013 are somewhat ambiguous. There are continual references to the special assessments as a "penalty," yet the funds generated were clearly viewed as an important monetary source for the Crime Victims' Assistance Fund.[2]

The Court of Appeals for the Tenth Circuit recently examined section 3013 to determine if special assessment penalties should be applied to crimes charged under the Assimilative Crimes Act, 18 U.S.C. § 13 (1982). *United States v. Mayberry*, 774 F.2d 1018 (10th Cir. 1985). Specifically, the court held that special assessment penalties are "penal in nature," and that the imposition of such an

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[2] The Federal Judicial Center published a comprehensive review of the Crime Control Act. It included a summary of the Senate Report prepared in conjunction with section 3013, summarizing: "[The Senate Report] indicates that the purpose of the special assessment is to raise revenue, but includes no interpretive commentary." Federal Judicial Center, The Crime Control and Fine Enforcement Acts of 1984: A Synopsis, at 38 (1984).

assessment represents "an additional penalty on those who commit state crimes on federal enclaves." *Id.* at 1021.

Four factors supported the *Mayberry* court's conclusion that special assessments were penal: (1) the assessment placed an additional burden or penalty on the defendant; (2) the assessment could only be imposed after conviction for a crime; (3) the assessment is higher for felonies than for misdemeanors, so that the punishment is tailored to the crime; and (4) the assessments are collected in the same manner as criminal fines, so that the "practical effect . . . is to make the assessment indistinguishable from a criminal fine." *Id.*

The *Mayberry* court also examined the legislative history of section 3013, concluding:

> Despite the fact that the section's stated purpose is to assist victims of criminal activity by establishing a relief fund, there can be little doubt that Congress understood the assessment to be at least partially punitive. In this regard, we note the Senate Report, which accompanied Senate Bill 2423, acknowledges that income generated through the assessment will not be substantial. [Citation omitted]. Such a statement casts doubt upon the notion that the Act's sole purpose was to raise revenue. We also point out that the same purpose—raising revenue to offset the costs of the victims relief program—was attributed to the fine increase section of the 1984 Crime Act. [Citation omitted]. Moreover, we think it of some import that the actual provision of [section 3013] entitles the section "Penalty Assessment," [citation omitted]; the Senate Report accompanying the bill refers to the assessment as a "penalty fee" and as "penalties"; and the Senate Report terms the section "Penalty Assessment Fines." [Citation omitted].

Id.

The defendant acknowledges *Mayberry,* but argues that this court should not be persuaded by the Tenth Circuit's reasoning. Defendant recites the four factors that *Mayberry* considered and attempts to refute each. Thus, defendant urges that (1) additional burdens are not necessarily penal, (2) special assessments are not a sentencing tool that necessarily increase with more serious crimes, (3) the goal of victim assistance programs is to benefit the public at large rather than to punish the defendant, and (4) the manner of collection should not affect the statutory characterization.

Although these distinctions have some merit, this court finds the Tenth Circuit's reasoning more compelling, and is therefore convinced that section 3013 is penal in nature. The revenue raising character of the statute is incidental and it was properly proposed in the Senate.[3] Accordingly, the magistrate's order is affirmed.

---

[3] As an additional basis to support constitutionality, the United States correctly notes that if a bill or amendment proposed by the Senate is "germane to the subject matter" of House legislation raising revenue, inclusion does not offend the origination clause. *Texas Association of Concerned Taxpayers, Inc. v. United States,* 772 F.2d 163 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 2265 (1986); *Armstrong v. United States,* 759 F.2d 1378 (9th Cir. 1985). However, as noted by the Fifth Circuit,

> "[s]ubject matter" appears to merely require that *both the amendment and the amended portion address revenue collection* [Citations omitted]. The Senate's amendment, adding new taxes, was germane to the subject matter and thus within the range of amendments permitted by the origination clause. [Emphasis added].

Texas Association of Concerned Taxpayers, Inc., 772 F.2d at 168. In *Armstrong,* 759 F.2d at 1382, the Ninth Circuit stated:

> we also conclude that once a *revenue bill* has been initiated in the House, the Senate is fully empowered to propose amendments, even if their effect will be to transform a proposal lowering taxes into one raising taxes. [Emphasis added].

In both cases, the legislation that originated in the House was primarily concerned with raising revenue, as were the Senate amendments. In contrast, the subject matter of the House bill in this case was crime control – not raising revenue. Thus, regardless of the effect of the "amendment," the "amended portion" of the legislation did not address revenue collection and this argument is incorrectly applied to section 3013.

II.

Number of Special Assessments

Defendant's second ground for appeal is the magistrate's imposition of two special assessment penalties. There were two counts in the indictment, which arose from one transaction.

The Court of Appeals for the Second Circuit recently rejected this argument, and the reasoning of that court is convincing. In *United States v. Pagen,* 785 F.2d 378, 381 (2d Cir. 1986), the court stated:

> We reject the notion . . . that section 3013 can reasonably be construed to require the imposition of only one assessment on a given defendant at a time, no matter on how many counts he may have been convicted. Such a reading is illogical. If a defendant were simultaneously convicted on one misdemeanor and one felony, the clear language of section 3013 would require separate $25 and $50 assessments. That being true, it cannot be supposed that Congress intended that the same defendant could be convicted simultaneously of several felonies and be subject only to a single $50 assessment. It is also unlikely that Congress would predicate the imposition of single or multiple assessments, based upon convictions for "an offense," upon the happenstance that an offense may

> be tried by itself or in combination with several other offenses. Furthermore, because money collected under section 3013 is paid into a Crime Victims' Fund [citation omitted], it is reasonable to conclude that Congress, aware that multiple offenses would often entail multiple victims, intended that there should be a separate assessment for each offense.

Id. at 381.

The reasoning in *Pagen* is sound and well supported by the language and the legislative history of section 3013. Accordingly, this court finds that section 3013 authorizes imposition of a special assessment penalty for each count on which the defendant was convicted.[4] The magistrate's imposition of two special assessment penalties is therefore affirmed.

III.

Petty Offenses

Defendant contends that special assessment penalties cannot be applied to petty offenses. However, the plain language of the statute refutes this contention.

Section 3013 mandates imposition of a special assessment penalty for any misdemeanor. 18 U.S.C. § 1(3) defines a petty offense as

> *[a]ny misdemeanor,* the penalty for which . . . does not exceed imprisonment for a period of six months or a fine of not more than $5,000 for an individual . . . is a petty offense. [Emphasis added].

[4] The Federal Judicial Center commentary on section 3013 also concludes that "[t]he assessment requirement probably applies separately to each count for which a defendant could be punished." Federal Judicial Center, The Crime Control and Fine Enforcement Acts of 1984, A Synopsis, at 39.

Thus, special assessment penalties apply to misdemeanors that also happen to be defined as petty offenses.

CONCLUSION

Upon due consideration of the parties' memoranda, the arguments advanced at hearing and for the reasons set forth herein, this court affirms the magistrate's denial of defendant's motion under Fed. R. Crim. P. 35 for correction of an illegal sentence.

DATED: August 6, 1986.

/s/ William B. Enright
WILLIAM B. ENRIGHT, Judge
United States District Court

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Crim. No. 85-0509-E

UNITED STATES OF AMERICA, PLAINTIFF

v.

GERMAN MUNOZ-FLORES (07), DEFENDANT

[Entered Aug. 11, 1986]

ORDER

Pursuant to this court's Memorandum Decision dated August 6, 1986, the order of the magistrate denying defendant's motion under Fed. R. Crim. P. 35 for correction of an illegal sentence is hereby affirmed.

IT IS SO ORDERED.

DATED: August 6, 1986.

/s/ William B. Enright
WILLIAM B. ENRIGHT, Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Case No. 85-509-E

UNITED STATES OF AMERICA

v.

GERMAN MUNOZ-FLORES (01)

[Filed Sep. 30, 1985]

JUDGMENT AND COMMITMENT

On this 20th day of September, 1985 came the attorney for the government and the defendant appeared in person and by counsel, Federal Defenders, Inc., by Judy Clarke.

IT IS ADJUDGED that the defendant has been convicted upon his plea of guilty of the offense of [*sic*] did knowingly aid and assist an undocumented alien, who was then and there an alien, to elude examination and inspection by Immigration officials of the U.S. in violation of Title 8, United States Code, Section 1325, and Title 18, United States Code, Section 2, as charged in Count One and Count Two of the superseding Information, and the magistrate having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUGED that as to Count One, the imposition of the sentence as to incarceration is suspended and the defendant is placed on unsupervised probation for a period of two (2) years, upon the following terms and conditions of probation: 1) that he obey all laws, state, federal and local; 2) that he maintain employment; (3) that he not transport anyone be believes to be an illegal alien.

IT IS ADJUDGED that as to Count Two, the imposition of the sentence as to incarceration is suspended and the defendant is placed on unsupervised probation for a period of two (2) years, upon the same terms and conditions imposed in Count One.

IT IS ADJUDGED that the remaining charges are dismissed and that the defendant shall pay a Penalty Assessment of $25 as to Count One and $25 as to Count Two pursuant to 18 USC 3013.

/s/ Irma E. Gonzalez
United States Magistrate

Filed: 9/20/85

WILLIAM W. LUDDY, Clerk

By: Dawn Y. Irame
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5236
DC No. 85-0509-E (IEG)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GERMAN MUNOZ-FLORES (07), DEFENDANT-APPELLANT

[Filed Mar. 29, 1989]

ORDER

Before: WRIGHT, FERGUSON, and O'SCANNLAIN, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge O'Scannlain has voted to reject the suggestion for rehearing en banc, and Judges Wright and Ferguson have so recommended.

The full court has been advised of the en banc suggestion, and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 86-5236
DC No. CR 85-0509-7-E

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

GERMAN MUNOZ-FLORES, DEFENDANT-APPELLANT

[Filed Apr. 13, 1989]

ORDER

Before: WRIGHT, FERGUSON, and O'SCANNLAIN, Circuit Judges.

Plaintiff-Appellee's motion to stay the mandate pending application to the Supreme Court for certiorari is GRANTED.

APPENDIX G

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA

Criminal Case No. 85-0509-E

UNITED STATES OF AMERICA, PLAINTIFF

v.

GERMAN MUNOZ-FLORES (07) ET AL., DEFENDANTS

INFORMATION
Superseding

Title 8, U.S.C., Sec. 1325;
Title 18, U.S.C., Sec. 2 –
Aiding and Abetting Illegal Entry

The United States Attorney charges:

COUNT ONE

That on or about February 26, 1985, within the Southern District of California, defendant GERMAN MUNOZ-FLORES, at a point in San Diego County, California, did knowingly aid and assist an undocumented alien, who was then and there an alien, to elude examination and inspection by immigration officials of the United States; in violation of Title 8, United States Code, Section 1325, and Title 18, United States Code, Section 2.

COUNT TWO

On or about February 26, 1985, within the Southern District of California, defendant GERMAN MUNOZ-FLORES, at a point in San Diego County, California, did knowingly aid and assist an undocumented alien, who was then and there an alien, to elude examination and inspection by immigration officials of the United States; in violation of Title 8, United States Code, Section 1325, and Title 18, United States Code, Section 2.

DATED: September 20, 1985

Respectfully submitted,

PETER K. NUNEZ
United States Attorney

LYNNE R. LASRY
Assistant U.S. Attorney

APPENDIX H

The current version of 18 U.S.C. 3013, as amended by the Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, § 3, 101 Stat. 1279 (adding new subsections (c) and (d) to § 3013), and by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7082, 7085, 102 Stat. 4407, 4408 (adding second sentence to § 3013(c) and amending § 3013(a)(1)), provides:

§ 3013. Special assessment on convicted persons

(a) The court shall assess on any person convicted of an offense against the United States –

(1) in the case of an infraction or a misdemeanor –

(A) if the defendant is an individual –

(i) the amount of $5 in the case of an infraction or a class C misdemeanor;

(ii) the amount of $10 in the case of a class B misdemeanor; and

(iii) the amount of $25 in the case of a class A misdemeanor; and

(B) if the defendant is a person other than an individual –

(i) the amount of $25 in the case of a infraction or a class C misdemeanor;

(ii) the amount of $50 in the case of a class B misdemeanor; and

(iii) the amount of $125 in the case of a class A misdemeanor.

(2) in the case of a felony –

(A) the amount of $50 if the defendant is an individual; and

(B) the amount of $200 if the defendant is a person other than an individual.

(b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

(c) The obligation to pay an assessment ceases five years after the date of the judgment. This subsection shall apply to all assessments irrespective of the date of imposition.

(d) For the purposes of this section, an offense under section 13 of this title is an offense against the United States.